

Before the
Federal Communications Commission

In the Matter of)	
)	
)	
Florida Department of Management)	Docket No. 02-6
Services Request for Waiver, or,)	
in the alternative, Review and Reversal)	
of a Funding Decision by the Universal)	
Service Administrator)	

Petition For Waiver of Deadline To File Correction to FCC Form 471,
Or in the Alternative, for Review and Reversal of a Funding
Decision by the Universal Service Administrator

Re: FY 2013-2014
FCC Form 471 #924027
FRNs 2529049, 2519117, and 2529049

The Florida Department of Management Services (Department) hereby files its petitioner for a waiver of a deadline set forth in FCC Order Rule 11-60 with respect to filing a corrected FCC Form 471 and for leave to file with Universal Service Administration Company ("USAC"), *nunc pro tunc*, as of June 18, 2014, a corrected FY 2013-2014 Form 471 #924027, which comprises three funding requests on behalf of Gadsden County School District ("Gadsden SD"). Specifically, the Department requests leave to correct the entry for Items 12 of FCC Form 471 #924027 by replacing the reference to Gadsden SD's FCC Form 470 #131430001117503 (hereafter "Gadsden SD's Form 470") with reference to Department's FCC Form 470 # 150090000693652 in FRNs 2529049 and 2519117 Item 12 and FCC Form 470 # 289460000614029 in FRN 2529049 Item 12 (hereafter the "Department's Forms 470"). In the

alternative, the Department petitions the Commission to review and reverse a decision by USAC to deny funding because the decision is based on a legal nullity.

While the Department apologizes for any inconvenience this request may cause, the relief here sought is necessary to avoid denial of \$85,876.85 in critical to funding Gadsden SD, a school district serving one of Florida's poorest rural counties. The denial of funding is unlawful, inequitable, harmful to Gadsden SD, and inconsistent with the Commission policy of "ensuring affordable access to high-speed broadband sufficient to support digital learning."¹

Request for Waiver of Deadline to File Correction to FCC Form 471

This matter involves the denial of three funding requests contained in FY 2013-2014 Form 471 #924027 filed by the Department on behalf of Gadsden SD. USAC performed a Selective Review of the Department's FCC Form 471 Application that resulted in the denial of funding of eligible services provided to Gadsden SD under Florida's SUNCOM enterprise statewide master contracts. The Funding Commitment Decision Explanation for FCC Form 471 #924027, FRNs 2529049, 2519117, and 2529049 states the following:

In response to the Selective Review Information Request, you have provided a Request for Proposal (RFP). Upon review we determined that the RFP stated that bids were due prior to the allowable contract date as indicated by the posting of your FCC Form 470. Your FCC Form 470 #131430001117503 was posted on 02/05/2013 with an Allowable Contract Date of 03/05/2013 but your RFP was released on 01/30/2013 with a due date 02/27/2013 which is prior to the FCC Form 470 Allowable Contract Date. You cannot close the bidding for either the RFP or the form 470 until the later either the Allowable Contract Date or the RFP due date. Since you indicated that the RFP responses were due prior to your Allowable Contract Date, you did not meet the program requirement, and, Application Number #924027, FRN 2529542 will be denied.

¹ *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, FCC 14-99, Report and Order and Further Notice of Proposed Rulemaking (released July 23, 2014), at para 5.

USAC's Fundamental Error

The denial of these three funding requests is clearly erroneous as a matter of law because USAC's decision rests on a legal nullity. Specifically, USAC determined that Gadsden SD's RFP closed prematurely, i.e., six days before the Allowable Contract Date. USAC's review failed to recognize that, as a matter of fact and law, Gadsden SD did not conduct a competitive procurement because it received no responses to its solicitation for proposals. In a nutshell, an RFP that produces no response is an offer not accepted: it has no legal effect whatsoever.

The conclusion that Gadsden SD's RFP is a legal nullity is required by Florida Statute. The competitive procurement process of Chapter 287, Fla. Stat., governs the procurement and contracting procedures for the eligible services sought here. Section 287.012(6), Fla. Stat., provides the following controlling definition:

"Competitive solicitation" means the process of requesting *and receiving* two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement. (emphasis added)

In the instant case, Gadsden SD did take the first necessary step to conduct a competitive solicitation by posting a solicitation for competitive sealed proposals.² However, because Gadsden SD did not receive even one response (much less two), there was no competitive solicitation.

Because Gadsden SD did not conduct a competitive solicitation, it could not have and did not procure the eligible services through its own competitive solicitation. Rather, it procured the eligible services through the SUNCOM enterprise statewide model contracts, which the Department procured through its own competitive solicitation as identified in its FCC Forms 470. Thus, the denial of funding is clearly erroneous as a matter of law because it is based on an

² Section 287.012 (23), Fla. Stat.

evaluation of a legal nullity that had nothing to do with the competitive procurement of the eligible services by the Department, which is the billed entity and applicant.

The FCC Form 471 Error

As noted, the error in FCC Form 471 the Department wishes to correct is the response to Item 12. The FCC Form 471 Instructions provides as follows with respect to Item 12:

Provide the 15-digit Form 470 Application Number of the Form 470 *in which the services ordered were sought*. This number appears on your Form 470 Receipt Notification Letter.³ (emphasis added)

Gadsden SD, as the Department's customer, initially populated the Department's FCC Form 471 with the required information. Department staff then reviewed the form to ensure accuracy before filing as the billed entity and as applicant on behalf of Gadsden SD.⁴

On Item 12, Gadsden referenced its "Identification of Services Requested and Certification Form 470 Number 131430001117503." Both Gadsden SD and the Department believe this was a reasonable response based on the instructions and context. In retrospect, however, this entry resulted in the denial of the Department's Form 471 application. The Department therefore respectfully requests the Commission to view the reference to Gadsden SD's FCC Form 470 as a clerical error based on the ambiguity of the instructions as applied to the SUNCOM enterprise statewide master contracts in this situation.

Although this is not the type of error most often characterized as "clerical,"⁵ the Commission has in the past recognized "entering the wrong FCC Form number" as a "ministerial

³ FCC Form 471 Instructions – December 2013.

⁴ Application Number #924027, FRNs 2529542, 2519117, and 2529049.

⁵ In *Order FCC 11-60*, for example, the Commission stated: "Such errors include only the kinds of errors that a typist might make when entering data from one list to another, such as mistyping a number, using the wrong name or phone number, failing to enter an item from the source list onto the application, or making an arithmetic error." *Id.* at page 3, released April 14, 2011

or clerical error.”⁶ Moreover, this is the most straightforward approach to avoiding an unlawful and harshly inequitable result incompatible with Commission policies and objectives. As a clerical error, the deadline for filing a correction would have been June 19, 2014, the time that USAC issued its Funding Commitment Decision Letter. Thus, the relief requested herein is that the Department be allowed to file, *nunc pro tunc*, as of June 18, 2014, a correction to the FCC Form 471 #924027.

Justification for Waiver

The Department respectfully submits that good cause exists to grant the requested waiver.⁷ Gadsden SD serves an impoverished, rural community in Florida’s Panhandle. The median per capita income in Gadsden County is \$18,183, significantly lower than Florida’s median per capita income of \$26,451.⁸ Roughly twenty-three percent of Gadsden County families have incomes that are considered below the poverty level and have relied upon food stamps or government assistance programs in the past twelve months, nearly double the statewide average.⁹ Gadsden County schools rank poorly compared to other schools in Florida,¹⁰ with only forty percent of Gadsden County students receiving a high school diploma.¹¹ Simply put, Gadsden SD can ill afford to lose the requested funding of \$85,876.85 to support broadband

⁶ *In the Matter of Requests for Waiver and Review of Decisions of the Universal Service Administrator by Ann Arbor Public Schools, Ann Arbor, MI, et al., Schools and Libraries Universal Service Support Mechanism, Order*, CC Docket No. 02-6, 25 FCC Rcd 17319 (Wireline Comp. Bur. 2010) at para. 2.

⁷ 47 C.F.R. §1.3.

⁸ <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

⁹ *Id.*

¹⁰ <http://www.schooldigger.com/go/FL/districtrank.aspx> (ranking Gadsden County schools 48th out of the 68 school districts in Florida).

¹¹ See *Infra* note 8.

services already taken during the FY 2013-2014. The Commission must avoid imposing this hardship on the Gadsden SD.¹²

The denial of the funding would not only impose a hardship on Gadsden SD, it would also be inequitable for at least two other reasons. First, it would deny funding based on a false premise, i.e., that Gadsden SD conducted a competitive procurement that did not comply with program requirements. Next, the decision would be inequitable because it would deny Gadsden SD E-rate funding where every other such funding request was approved. Specifically, the instant three funding requests were among one hundred comparable funding requests for FY 2013-2014 referencing contracts and FCC Forms 470 that were processed through Selective Review. All of these funding requests were based on the SUNCOM statewide master contracts and for E-rate eligibility purposes were virtually the same. They were not treated the same, however: ninety-seven of these requests received funding commitments but the three filed on behalf of Gadsden SD were denied. Moreover, as already demonstrated, the basis of denial was an illusory procedural flaw and not some substantive problem with the application.

Allowing the Department to file the correction to FCC Form 471 #924027 is clearly in the public interest. Indeed, the rationale the Commission has relied upon in the past to grant waivers to avoid complete rejection of funding appears to apply with equal force here. In the *Bishop Perry Order*, for example, the Commission explained the rationale for granting waiver requests as follows:

We do not believe that such minor mistakes warrant the complete rejection of each of these applicants' E-rate applications, especially given the requirements of

¹² The Commission has consistently emphasized the importance of avoiding such hardships through the mechanical application of technical filing requirements. See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School et al., Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-487170 et al., CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5320, para. 9 (2006).

the program and the thousands of applications filed each year. Importantly, applicants' errors could not have resulted in an advantage for them in the processing of their application. That is, the applicants' mistakes, if not caught by USAC, could not have resulted in the applicant receiving more funding than it was entitled to. In addition, at this time, there is no evidence of waste, fraud or abuse, misuse of funds, or a failure to adhere to core program requirements. Furthermore, we find that the denial of funding requests inflicts undue hardship on the applicants. In these cases, we find that the applicants have demonstrated that rigid compliance with the application procedures does not further the purposes of section 254(h) or serve the public interest. (citations omitted)¹³

For Gadsden SD, the requested funding plays a “critical role...in the lives of our students” and remains critical to supporting “sufficient, equitable, and predictable support for high-speed connectivity to and within (its) schools and libraries.”¹⁴ It is difficult to conceive of a situation where granting a waiver to allow a clerical change would more directly serve the purposes of E-rate funding or more directly promote the public interest.

Alternative Petition for Review and Reversal

The Department’s focus here is to ensure that the Gadsden SD is not deprived of the funding it deserves and that the Commission E-rate program intends to provide. The Department does believe that the most useful approach to this end is to allow the Department to treat the information provided in response to Item 12 as a clerical error and to file an amendment to FCC Form 471 #924027 *nun pro tunc* as of June 19, 2014. Nevertheless, if the Commission does not agree that the filing of a correction to Form FCC 471 #924027 is appropriate, the Department, in the alternative, would request the Commission to waive the deadline for filing appeals of USAC denials of funding, review the basis of that denial, and reverse that decision for the reasons given above.

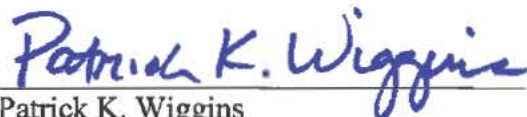
¹³ *Id.* at para. 11.b

¹⁴ *E-rate Modernization Order* at para. 4.

Conclusion

For the above reasons, the Florida Department of Management Services respectfully requests to Commission to grant it leave to file, *nunc pro tunc*, as of June 18, 2014, a correction to FCC Form 471 #924027 that replaces the current reference to Gadsden SD's FCC Form 470 #131430001117503 with reference to Department's FCC Form 470 # 150090000693652 in FRNs 2529049 and 2519117 Item 12 and FCC Form 470 # 289460000614029 in FRN 2529049 Item 12. In the alternative, the Department respectfully requests the Commission to review the decision by USAC to deny \$85,876.85 in critical to funding Gadsden SD, a school district serving one of Florida's poorest rural counties. As shown above, the denial of funding is unlawful, inequitable, harmful to Gadsden SD, and inconsistent with the Commission policy of promoting high-speed broadband access to support digital learning. To reiterate, it is difficult to conceive of a situation where granting a waiver to allow a clerical change would more directly serve the purposes of E-rate funding or more directly promote the public interest.

Respectfully submitted this 20th day of October 2014, by:



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